IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.954 of 1999
In
Company Petition No.581 of 1998

M/s.Goel Roadways Pvt.Ltd., a Private Limited Company, Resgistered under the Companies Act, 1956, having its registered office at 155B, M.G.Road, Calcutta- 700007. .. Appellant (Org.Petitioner)

Versus

The Kanoria Sugar and General Manufacturing Company Limited, a Limited Company, registered under the Companies Act, 1956, having its registered office at Rajan House, 2nd Floor, A.M.Marg, Prabhadevi, Bombay - 400 025. .. Respondent

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Shri V.M.Bhardwaj for the appellant.

None for the respondent.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 5TH APRIL, 2007

ORAL JUDGMENT: (Per D.G.KARNIK, J)

1. This appeal is directed against the judgment and order dated 19th February, 1999 passed by the Learned Company Judge dismissing the appellant's petition for an order of winding up of the respondent

company.

2. The petitioner is a transporter. It transported diverse consignments on behalf of the respondent. According to the petitioner, a sum of Rs.2,88,411/- is due and payable by the respondent to the petitioner towards the transport charges. Despite the notice of demand the respondent failed to pay the dues. Therefore, after the service of the notice under Section 434 of the Companies Act, 1956, the petitioner filed a petition for winding up of the respondent.

3. The respondent appeared and defended the petition, on the ground that no amount was due to the petitioner. The respondent principally had three defences. The respondent firstly contended that one consignment of machinery which was transported by the petitioner was damaged during transit. The petitioner had assured to give certificate of damage but the same was not given. The damage was to the tune of Rs.5 lakhs. The respondent therefore had a claim against the petitioner which was in excess of the petitioner’s demand. Secondly, the petitioner had also transported another consignment of goods which were purchased by the petitioner from Walchand Nagar Industries Limited,

Pune. The excise gate pass for the equipments purchased given by Walchand Nagar Industries Limited, Pune, to the petitioner was not given by the petitioner to the respondent. The petitioner only delivered the goods without the excise gate pass. On account of non supply of excise gate pass Modvat Credit to the extent of Rs.70,000/- could not be availed of by the respondent. The respondent was therefore entitled to recover the said sum of Rs.70,000/- from the petitioner. Thirdly, the petitioner had also transported some equipment for the respondent from Chennai (Madras). The petitioner had charged the respondent a sum of Rs.2,64,695/- as freight claiming that three trailers were used for transportation of the equipment. According to the respondent, only one truck was sufficient for transporting the said equipment. The petitioner had not given any justification for the use of three trailers and for charging the freight for the use of the said three trailers. Thus, the total value of the claim of the respondent exceeded the claim made by the petitioner in the winding up petition.

4. Learned advocate for the petitioner invited our attention to the minutes of the meeting dated 8th November, 1995, and submitted that in the said meeting

it was agreed between the parties that the respondent would be entitled to deduct a sum of Rs.4,76,313/- instead of Rs.5,26,313/- claimed by it as a deduction. The minutes do not disclose what was the nature of the deduction. Assuming that the said deduction was in respect of the claim for damages for the loss caused to the goods during the transit, i.e. the respondent's defence No.1, it is worthwhile to note that in the said settlement, what was agreed was the amount of deduction to be made but the quantum of amount due after the deduction was not agreed upon. No evidence was adduced before the Learned Company Judge to show that what was the amount due from which Rs.4,76,313/- were to be deducted and after the said deduction, what amount would remain due and payable by the respondent to the petitioner. Furthermore, in the meeting dated 8th November, 1995 admittedly no settlement was reached in respect of the other claims of the respondent i.e. Rs.70,000/- for non delivery of the gate pass and claim that the petitioner had charged excess freight for transportation of the goods from Madras to its workshop.

5. In view of the defences which the Learned Company Judge felt were bonafide, there were disputes between the parties and the claim of the petitioner

was neither in respect of the admitted amount nor could it be said that the amount was positively due. We are of the opinion that the Learned Company Judge was right in holding that there was a bonafide dispute between the parties regarding the amount due and whether any amount at all was due by the respondent to the petitioner. In the circumstances, the appropriate remedy for the petitioner is to file a suit for recovery of the money and not a petition for winding up.

6. In the circumstances, there is no merit in the appeal which is hereby dismissed. Since the respondent has not appeared at the hearing in the appeal, there shall be no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)